Supreme Court, U. S.
FILED
MAY 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-792

BERNARD G. RUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supplemental Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

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BERNARD G. RUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supplemental Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Additional Question Presented.

WHETHER THE COURT OF APPEALS PROPERLY IMPOSED THE CONCURRENT SENTENCE DOCTRINE TO PRETERMIT REVIEW OF TWO COUNTS WHICH ENCOMPASSED $329,031 OF $384,331 ALLEGEDLY EMBEZZLED BY PETITIONER.

Introduction and Statement.

On December 2, 1977, petitioner filed a timely petition for writ of certiorari in this Court. The petition raised issues concerning whether constitutionally impermissible impeachment evidence tainted the trial and

whether the Indictment should have been dismissed for failure to record the grand jury proceedings despite timely pre-indictment request.

In the instant trial, the vast bulk of the documentary evidence dealt with the government's contention that petitioner had improperly engaged in multiple duplicate expense billing to the union entities in which he was an officer. However, petitioner was convicted on two counts which charged that as President of both the Southeast Florida Laborers' District Council and Local 666, he had engaged in "unauthorized salary increases, that is, salary increases obtained not in accordance with [the respective entity's constitution] and not in accordance with the laws of the United States." (R. 122). These two counts comprised $329,031 of the $384,331 allegedly embezzled by petitioner.

In the court of appeals, petitioner argued that the convictions on these counts were tainted (1) because the district court had excluded highly relevant state of mind evidence due to an erroneous belief that the evidence constituted hearsay and (2) that petitioner was prejudiced by the improper use of codified federal civil law on fiduciary responsibility and exculpatory resolutions.[1]

In affirming the convictions herein, the court of appeals pretermitted review of the two salary increase counts (559 F.2d 975, 990 at fn. 14; App. 37):[2]

> "Two claims, one asserting that the trial court improperly excluded certain defense evidence as hearsay and one challenging the court's instructions on the fiduciary duties of a union official under 29 U.S.C. §501(a) were raised pertinent to the embezzlement counts that charged unlawful salary increases. We need not reach these claims because of the operation of the concurrent sentence doctrine."

[1]These arguments were contained within appellant's opening brief pp. 33-47. A copy of the brief is being lodged contemporaneous to the filing of this petition.

[2]"App." is a reference to the Appendix to our initial Petition for a Writ of Certiorari.

Subsequent to the filing of the petition herein, counsel for petitioner became aware of the recent Eighth Circuit decision in *United States v. Holder,* 560 F.2d 953 (1977), which reassessed and abandoned the concurrent sentence doctrine in view of the current policy of the United States Board of Parole which results in an increased period of incarceration for persons convicted on multiple counts. In concluding that the concurrent sentence doctrine "ought not to be invoked where there is a likelihood that its application may expose a defendant to the risk of adverse consequences caused by an invalid but unreversed conviction" (*Id.* at 955), the court determined that the practical effect of application of the doctrine resulted in an increased period of incarceration (*Id.* at 956):

> "In this instance, we can identify at least one circumstance in which our failure to review an erroneous count will expose the defendant to potential adverse consequences. In assessing a prisoner's eligibility for parole, parole boards are instructed to consider a number of factors, including the prisoner's 'offense severity rating' and his 'salient factor score.' Both are determined pursuant to guidelines published by the United States Board of Parole. To calculate a prisoner's offense severity rating, the Board has established severity ratings for various offenses and a recommended time range

for parole which corresponds to a particular severity rating. Among the notes to the published guidelines, there appears the statement, 'If an offense behavior involved multiple separate offenses, the severity level may be increased.' Thus, the guidelines and explanatory notes confirm the fact that our failure to review a particular count of a multi-offense conviction may well lead to a higher severity rating and, accordingly, reduced parole opportunities.

In addition, the salient factor score, which is also used in assessing a prisoner's eligibility for parole, establishes a point rating based in part on the offender's number of prior convictions. Multiple offenses are considered as a single conviction, for rating purposes, where the various counts arise from a single offense behavior. For example, when a defendant is convicted of several heroin sales occurring within a limited time period, say two months, those offenses are treated as a single behavior and rated as a single conviction. When, on the other hand, related offenses were committed over a longer period of time, they may be treated as arising out of separate offense behaviors and rated as separate convictions under the salient factor formula. This is but another way in which our failure to review an erroneous count under the concurrent sentence rule may, in fact, prejudice a defendant's chances for early parole.

For many years, we have applied the concurrent sentence rule in the interest of judicial economy with the reservation that it not be followed where it might expose the defendant to substantial risk of adverse consequences. *Sanders v. United States,*

541 F.2d at 193; *United States v. Belt,* 516 F.2d 873. Until recently, we have lacked evidence that applying the concurrent sentence rule would influence parole status decisions. It now appears that the United States Board of Parole's regulations for determining parole eligibility necessitate a reassessment of that doctrine. Because we have identified the possibility of adverse consequences, we will consider the validity of Holder's evidentiary claim." [Footnotes omitted].

The court also noted the government's *concession* that application of the concurrent sentence rule might prejudice that defendant under the Board of Parole's current regulations.

Upon learning of the principles espoused by *Holder,* petitioner's counsel promptly filed a petition for rehearing in the United States Court of Appeals for the Fifth Circuit, raising only whether the court properly imposed the concurrent sentence doctrine in the instant case. Contemporaneously, petitioner filed a Motion to Withhold Determination on Petition for Writ of Certiorari in this Court.

Thereafter, the Fifth Circuit invited the government to respond to our Petition for Rehearing. On March 27, 1978, the court of appeals granted leave to file the petition.[3]

In its response to our supplemental petition in the court of appeals, the government conceded, as indeed

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[3]The government's response conceded that the Fifth Circuit possessed jurisdiction to consider the supplemental petition. Similarly, this Court has jurisdiction to consider this supplemental petition despite its not being filed within the original thirty (30) day period. *Schact v. United States,* 398 U.S. 58 (1970); *Durham v. United States,* 401 U.S. 481 (1971).

was required, that according to the Bureau of Prisons guidelines, the effect of the unreviewed and extant counts was to raise the severity of his offense from "high" ($20,000 to $100,000) to "very high." (Brief for Appellee in response to Appellant's Supplemental Petition for Rehearing (page 12); See 42 Fed. Reg. 39813-39815). Thus, assuming petitioner would receive a salient factor score that gave him a "very good" parole prognosis, the guidelines recommend that he serve 26-36 months where the offense characteristic is "very high" instead of 16-20 months where the offense has a "high" severity characteristic (42 Fed. Reg. 39813-39814).

On April 11, 1978, the supplemental petition for rehearing was denied.

The Court of Appeals Improperly Invoked the Concurrent Sentence Doctrine to Pretermit Review of Two Counts Which Encompassed $329,031 of $384,331 Allegedly Embezzled by Petitioner; This Court Should Grant Review to Provide Guidance and Resolve a Conflict in the Circuits as to Imposition of the Doctrine.

The instant case presents a primordial context within which this Court can provide guidance to the various circuits in the application of the concurrent sentence doctrine. Since *Benton v. Maryland*, 395 U.S. 784 (1969), disparate application of the doctrine has become indeed its hallmark. Here, assuming the Bureau of Prisons will follow its own guidelines,[4] the effect of the unreviewed count is to escalate the likely period

[4]As we argue, *infra*, "experience indicates that the overwhelming majority of parole decisions fall within the guidelines" *Ruip v. United States*, 555 F.2d 1331, 1333 (6th Cir. 1977).

of petitioner's incarceration from 16-20 months to 26-36 months.

We, of course, recognize that we have tendered this issue to the Court in a "piecemeal" context. Yet, we respectfully request this Court's discretion to not penalize petitioner as a consequence. Manifestly, the timing was caused by counsel's non-recognition of the potential adverse effect on petitioner's parole eligibility. As counsel explained to the court of appeals, the supplemental petition for rehearing was filed promptly after counsel learned of the Eighth Circuit decision in *Holder, supra*. It certainly would not follow that any tactical decision caused the delay in asserting the claim. We turn then to a consideration of the merits of the issue we proffer.

Petitioner Is Likely to Suffer Adverse Collateral Consequences From the Unreviewed Counts.

In *Benton v. Maryland*, 395 U.S. 784 (1969), this Court determined that a concurrent sentence did not raise a jurisdictional bar to consideration. Nevertheless, the Court opined that the concurrent sentence doctrine may have some continuing validity as a rule of judicial convenience (*Id.* at 791). The touchstone for resolving the appropriateness *vel non* of the application of the doctrine is whether adverse collateral consequences may flow from the conviction.

The likelihood of harm to petitioner in the instant case is manifest. The government contended in the court below that the application of the doctrine is proper, claiming that petitioner's claim is "premature" and that "we do not know yet what action the Commission will take" (Brief for Appellee, *supra*, at page 15). In the event the Commission were to rate petitioner

in the "very high" category based on the unreviewed embezzlement counts, the government's suggested remedy for petitioner is to "challenge that designation through the administrative appeals procedure . . . and if unsuccessful, in the courts" (*Ibid.*). This disingenuous approach by the government overlooks the underpinnings to the concurrent sentence doctrine. Plainly, the doctrine is properly applied only where the court can be assured that collateral consequences will not flow from the failure to afford review. As *Holder* and similar cases recognize, where, as here, the Bureau of Prisons guidelines establish the potential adverse consequences *prima facie*, a person seeking review on direct appeal of a conviction is entitled to plenary review. Although, as the government contends, Congress has vested the Parole Commission with "very broad discretion" which would permit the Parole Board to make decisions outside the guidelines where circumstances warrant, "nevertheless experience indicates that the overwhelming majority of parole decisions fall within the guidelines," *Ruip v. United States*, 555 F.2d 1331, 1333 (6th Cir. 1977); *United States v. Salerno*, 538 F.2d 1085, 1087 (3rd Cir. 1976); *Kortness v. United States*, 514 F.2d 167, 169 (8th Cir. 1975); *Project, Parole Release Decision Making and the Sentencing Process*, 84 Yale L.J. 810, 825 n.75 (1975).

It is a strange anomaly indeed for the government to suggest that despite the guidelines, a defendant is "premature" and speculative in suggesting that the administrative agency will follow its own guidelines. Our argument, of course, acquires greater efficacy by the experience that the Commission does indeed follow its guidelines. It certainly does not further the interest of judicial economy to ignore the guidelines in order

to pretermit review of claims on direct appeal by a finding of no collateral consequences then invariably face the issues in future litigation, when in fact the Commission acts precisely as the guidelines suggested it would act. Moreover, to require a litigant to await the actual violative act by the Parole Commission, then institute action within the agency and later the courts could result in sufficiently extended litigation that outlasts the term of service of the incarceration. Indeed, in *Sibron v. New York*, 392 U.S. 40, 57 (1968), the Court cogently observed:

> [I]t is far better to illuminate the source of a potential legal disability than to require the citizen to suffer the possible unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action."

The government was similarly in error in its contention to the court below that the Parole Commission could properly consider the conduct alleged in the unreviewed counts even in the event the court reversed the convictions. While the Parole Commission has broad discretion to consider underlying facts supporting alleged criminal behavior of the prisoner, the government's argument simply ignores the critical aspect of our challenge to these counts. Our argument as to the invalidity of these counts reflected our view that the indictment charged conduct which did not amount to a criminal offense.[5] Thus, if a court reviews these counts and agrees with our contention, the Parole

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[5]Thus, as we pointed out in our opening brief, appellant moved the district court for dismissal of these counts for failure to state an offense (Opening Brief, p. 41).

Commission will properly be deprived of consideration of these underlying facts—since they would not be considered criminally culpable conduct. Moreover, the other argument which was pretermitted on our original appeal—that the trial court improperly excluded highly relevant and admissible evidence pertaining to appellant's state of mind—goes directly to appellant's innocence of the offenses. Accordingly, the Parole Commission could not properly consider any conduct contained within these counts, after reversal.

Moreover, as we urged to the court below, petitioner is currently defending a civil action launched by a District Council member (*Jackson v. Rubin,* U.S.D.C. S.D. Fla., No. 75-2942-Civ). The plaintiff has moved for a partial summary judgment, claiming that defendant is collateraly estopped from litigating the validity of his salary increases. The government contended to the court of appeals that "appellant's conviction of salary embezzlement does not preclude him from challenging that evidence in the civil suit brought by the union. See *Ashe v. Swenson,* 397 U.S. 436, 442 (1970)" (Brief for Appellee, *supra,* at page 13, fn. 7). Unfortunately, *Ashe* does not support the government's position. In our view, the implication resulting from *Ashe* is that if review of the entire record reveals that the same issue necessarily inhered in the verdict, the defendant would be collaterally estopped from relitigating the issue in a civil trial. Indeed, petitioner did not oppose the plaintiff's motion by claiming the inapplicability of collateral estoppel. Rather, petitioner claimed that the court should not grant a summary judgment because petitioner has never received appellate review to the validity of the conviction on the salary embezzlement counts. We urged there, as we do here, that

petitioner's arguments as to the invalidity of the counts struck at the guilt finding process, *i.e.,* whether petitioner was in fact guilty of the offense. In our view, the imposition of a civil penalty of the magnitude involved here was sufficient "collateral legal disadvantage" *Pollard v. United States,* 352 U.S. 354, 358 (1957), to militate in favor of appellate review. See also *Sibron v. New York, supra,* at page 55.

The Court Should Grant Review to Settle This Important Issue Upon Which the Circuits Are in Conflict.

As exemplified by the case at bar, in numerous cases, the federal circuits have grappled with the concurrent sentence doctrine with disparate results. The result of this disparity is an irregular and elusive exercise of the purported rule of judicial convenience both within and among the courts of appeal in the various circuits.

Despite the application of the concurrent sentence doctrine by the court below, the rule we espouse, *i.e.,* the non-application of the concurrent sentence doctrine where parole eligibility may be affected is consistent with the reasoning of other courts. *United States v. McKenzie,* 414 F.2d 808, 811 (3rd Cir. 1969); *United States ex rel. LaMolinare v. Duggan,* 415 F.2d 730 (3rd Cir. 1969); *Close v. United States,* 450 F.2d 152 (4th Cir. 1971); *United States v. Machibroda,* 338 F.2d 947 (6th Cir. 1964); *United States v. Tanner,* 471 F.2d 128, 140 (7th Cir. 1972); *Wright v. United States,* 519 F.2d 1964 (7th Cir. 1972); *United States v. Clermon,* 432 F.2d 1215 (9th Cir. 1970); *Fuller v. United States,* 407 F.2d 1199, 1233 n.52 (D.C. Cir. 1968); *Kee v. United States,* 418

F.2d 465 (D.C. Cir. 1969). See also *Cramer, Concurrent Sentence Doctrine Limited,* 36 D.C. Bar J. 46 (1969).

The Seventh Circuit has adopted the approach that where there exists any possibility of adverse legal consequences resulting from not reviewing the validity of all the challenged convictions, such challenged counts will be reviewed. *United States v. Tanner, supra; Wright v. United States, supra; United States v. McLeod,* 493 F.2d 1186, 1189 (7th Cir. 1974).

In the Second Circuit, while a recent decision used language similar to *Tanner, supra* (*United States v. Daley,* 564 F.2d 645, 647 fn.2 (2d Cir. 1977)), other cases in the circuit have not employed the approach of "any possibility" of collateral consequences requiring review but, instead, have limited such review where "the possibility of any future collateral consequences seems too remote." See *United States v. Febre,* 425 F.2d 107, 113-114 (2d Cir.), *cert. denied* 400 U.S. 849, 92 S.Ct. 40, 27 L.Ed.2d 87 (1970). See also *United States ex rel. Weems v. Follette,* 414 F.2d 417, 419 (2d Cir. 1969), *cert. denied* 397 U.S. 950, 90 S.Ct. 973, 25 L.Ed.2d 131 (1970).

In his dissenting opinion in *Febre,* Chief Judge Hayes argued that prejudice should be presumed when there is no review of a challenged count:

> "While Benton v. Maryland does not expressly rule out for all purposes the concurrent sentence doctrine, it manifests such basic dissatisfaction with the doctrine as to suggest that its total elimination merely awaits a proper case . . .
>
> The effect to be given *Benton* must, it seems to me, require a change in our rule from one

> providing that in the case of concurrent sentences, the questioned conviction on one count will not be considered unless it can be shown that the defendant would be prejudiced if the conviction was unjustified, see United States v. Barash, 365 F.2d 395 (2d Cir. 1966), to one providing rather that prejudice will be presumed unless it is clearly shown that in fact no prejudice would result. See United States ex rel. Weems v. Follette, 414 F.2d 417 (2d Cir. 1969)."

Although no guidelines emerge from the Sixth Circuit decisions, that court has often exercised its discretion under *Benton* to review multiple convictions, *United States v. Jones,* 533 F.2d 1387, 1390 (6th Cir. 1976); *United States v. Maze,* 468 F.2d 529 (6th Cir. 1974), affirmed 414 U.S. 395, *cf. Ethridge v. United States,* 494 F.2d 351 (6th Cir. 1974), *cert. den.* 419 U.S. 1025.

The Third Circuit in a case which immediately followed *Benton* in 1969 exercised its discretion to review the challenged count. *United States v. McKenzie,* 414 F.2d 808, 811 (1969):

> "While the Court in *Benton* did not resolve the question of whether prejudice beyond that inherent in being convicted of two offenses and serving two sentences therefor, albeit concurrently, must be shown to obtain relief, sufficient prejudice was found in the possibility that the defendant might someday be subject to an habitual criminal statute and have both convictions counted against him. We reject the Government's contention here because we also find that there is sufficient prejudice here to justify vacating the lesser concurrent sen-

tences if it was error to sentence appellant on counts one and two. As was said in Hibdon v. United States, 204 F.2d 834, 839, 37 A.L.R.2d 1130 (6th Cir. 1953): 'it is well understood that a multiplicity of sentences impairs a prisoner's opportunities for pardon or parole.' "

In a later Third Circuit case, *United States ex rel. LaMolinare v. Duggan,* 415 F.2d 730, 736 (1969), Judge Stahl noted his view that Benton signaled the death knell for the concurrent sentence doctrine:

> "The concurrent sentence doctrine, which reached its pinnacle in *Hirabayashi v. United States* [cites omitted] only recently met its demise in *Benton v. Maryland* [cites omitted]."

The Fourth Circuit considers the substantial "harm" that would result if the appellant's challenged count were not considered. See *Close v. United States,* 450 F.2d 152, 155 (4th Cir. 1971), citing *Fuller v. United States,* 407 F.2d 1199, 1233 n.52, *cert. den.* 393 U.S. 1120, 89 S.Ct. 999, 22 L.Ed.2d 125.

The Eighth Circuit, of course, now flatly conflicts with the decision reached here. See *Holder, supra.* See also *Sanders v. United States,* 541 F.2d 190, 193-194 (8th Cir. 1976); *United States v. Neff,* 525 F.2d 361, 363-365 (dissenting opinion).

The Ninth Circuit treatment of the concurrent sentence doctrine since *Benton* has been one of deference to the rule of judicial convenience. See *Jordan v. United States,* 416 F.2d 328, 346 (9th Cir. 1969) where the court summarily concluded that the "guilt on six other counts of the indictment makes it unnecessary for us to decide whether the assessment of

guilt on the seventh count . . . is valid." See also *van Gelden v. Field,* 498 F.2d 400, 403 (9th Cir. 1974).

The District of Columbia has adopted a rule that (*United States v. Hooper,* 432 F.2d 604, 606 (1970)):

> "Where there is doubt of the concurrent convictions the sound course, we think, is either to determine the matter on the merits, as in *Benton* or to vacate the sentence because of the overall interest of justice in effective disposition of appellate dockets, at least where there is neither injustice done defendant nor a need of the government overridden."

See also *United States v. Casson,* 434 F.2d 415, 417 n.8 (D.C. Cir. 1970); *Justin v. Jacobs,* 449 F.2d 1017, 1019-1020 (D.C. Cir. 1971); *United States v. Battle,* 510 F.2d 776, 777 (D.C. Cir. 1975).

Moreover the Fifth Circuit's own decisions create conflict within the circuit. Thus, in *Holland v. United States,* 384 F.2d 370 (5th Cir. 1967), the court also refused to invoke the concurrent sentence doctrine to preclude review. Explaining *United States v. Machibroda,* 338 F.2d 947 (6th Cir. 1964), the court stated:

> "The court held that the imposition of the concurrent sentences was improper. In its opinion, the court observed that the fact that the robbery sentences were longer than the concurrent 'entering with intent to rob' sentences did not render the appellant's appeal frivolous, saying: '[I]t is well understood that a multiplicity of sentences impairs a prisoner's opportunity for pardon and parole.'
> Also, in Audett v. United States, the court rejected as improper the proposition of concurrent sen-

> tences for simultaneous violations of more than one provision of 18 U.S.C.A. §2113. That a multiplicity of concurrent sentences is prejudicial as impairing a prisoner's opportunity for pardon or parole was also recognized in Hibdon v. United States, 6 Cir. 1953, 204 F.2d 834, 839, and in Green v. United States, 1 Cir. 1960, 274 F.2d 59, 61."

See also *United States v. Wilkerson,* 469 F.2d 967 (5th Cir. 1972); *United States v. Driscoll,* 454 F.2d 792, 801 (5th Cir. 1972); See *United States v. Windom,* 510 F.2d 989, 996 (5th Cir. 1975). Compare *United States v. Bingham,* 421 F.2d 1344, 1346 (5th Cir. 1970); *United States v. Binetti,* 547 F.2d 265 (5th Cir. 1977); *United States v. Ordoneaux,* 512 F.2d 63 (5th Cir. 1975).

In the court below, while urging affirmance of the convictions herein, the government nevertheless conceded that the courts of appeals have "taken varying approaches" (Appellee's Brief, *supra,* at p. 11 fn. 6) as to whether to impose the doctrine.

This Court has not since *Benton* treated the current viability or indeed established guidelines to guide the exercise of discretion by the various circuits. The resulting disparity creates an issue of grave importance which requires this Court's attention. The instant case presents a ripe controversy which portrays the real and substantial likelihood of significant adverse consequences should the salary embezzlement counts remain unreviewed. Ultimately, this case should properly be remanded to the court of appeals with instructions to afford the review previously denied.

Conclusion.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A.D. 1978.

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